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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DONALD DOUGLAS BREIER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether, in light of the general saving provision, 1 U.S.C. 109, the amendments made to certain provisions of the Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1216 (1968), by the Firearms Owners' Protection Act (FOPA), Pub. L. 99-308, 100 Stat. 449 (1986), apply to cases pending in the federal courts after the effective date of the FOPA which have arisen from acts committed prior to that date.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. B) is reported at 813 F.2d 212 (9th Cir. 1987). The order denying rehearing (App. A) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 16, 1987; a timely petition for rehearing was denied on September 16, 1987, with one judge dissenting and stating that he would reverse the conviction. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

Firearms Owners' Protection Act, Pub. L. 99-308, 100 Stat. 449 (1986).

Section 1. Short Title and Congressional Findings.

* * * *

(b) Congressional Findings.—The Congress finds that—

(1) the rights of citizens—

(A) to keep and bear arms under the second amendment to the United States Constitution;

(B) to security against illegal and unreasonable searches and seizures under the fourth amendment;

(C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and

(D) against unconstitutional exercise of authority under the ninth and ~~tenth~~ amendments;

require additional legislation to correct existing firearms statutes and enforcement policies; and

(2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.".

Sec. 101. AMENDMENTS TO SECTION 921.

Section 921 of title 18 United States Code, is amended—

* * * *

(6) in subsection (a), by inserting after paragraph (20) the following new paragraphs:

"(21) The term 'engaged in the business' means—

(C) as applied to a dealer in firearms, as defined in section 921(a)(11)(A), a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principle objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of personal collection or for a hobby, or who sells all or part of his personal collection of firearms;

* * * *

Sec. 102. AMENDMENTS TO SECTION 922.

Section 922 of title 18, United States Code, is amended—

(1) so that paragraph (1) of subsection (a) reads as follows:

"(1) for any person—

"(A) Except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms . . . .

* * * *

Sec. 110. EFFECTIVE DATE.

(a) In General.—The amendments made by this Act shall become effective one hundred and eighty days after the date of enactment of this

Act. Upon their becoming effective, the Secretary shall publish and provide to all licensees a compilation of the State laws and published ordinances of which licensees are presumed to have knowledge pursuant to chapter 44 of title 18, United States Code, as amended by this Act.

* * * *

(b) Pending Actions, Petitions, and Appellate Proceedings.—

The amendments made by sections 103(6)(B), 105, and 107 of this Act shall be applicable to any action, petition, or appellate proceeding pending on the date of the enactment of this Act.

18 U.S.C. 922. Unlawful acts. (1985)

(a) It shall be unlawful—

(1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition . . . .

* * * *

1 U.S.C. 109.

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

STATEMENT OF THE CASE

Donald Douglas Breier, a gun collector who owns a design telecommunications system company, was indicted on January 31, 1986 on five counts of violating 18 U.S.C. 922(a)(1), unlicensed dealing in firearms, based upon the sale of five firearms in September and November, 1985 at various public gun shows where Breier rented tables. A jury trial commenced on April 1, 1986 and Breier was convicted by the jury on all five counts. On

May 11, 1986, Breier was sentenced to a term of 45 days in the custody of the Attorney General, three years probation, and a $5,000 fine. Eight days later, on May 19, 1986, the President signed into law the Firearms Owners' Protection Act (FOPA), Pub. L. 99-308, 100 Stat. 449 (1986), most provisions of which—including the amendments to § 922(a)(1) and § 921(a)—became effective 180 days after enactment, i.e., November 15, 1986.

On May 20, 1986, Breier timely filed a notice of appeal with the U.S. Court of Appeals for the Ninth Circuit which, on February 2, 1987, heard oral argument. In his briefs and oral argument, Breier contended that the amendments made by the FOPA to § 922(a)(1) and § 921(a) required that his conviction be reversed since, under the amended provisions, he would have not been convicted. After the Court of Appeals, on March 16, 1987, filed its opinion affirming Breier's conviction on the ground that the FOPA did not apply to his case in light of the general federal saving clause, 1 U.S.C. 109, Breier petitioned for rehearing. Following a July 31, 1987 order of the Court of Appeals that the parties submit supplemental briefs on whether it was the intent of Congress to apply the amendments made by the FOPA to cases pending after November 15, 1986 which arose from acts committed prior to that date, Breier's petition for rehearing was denied on September 16, 1987, with Judge Noonan dissenting and voting to reverse Breier's conviction.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS DECISION IS IN CONFLICT WITH *UNITED STATES v. ORELLANES*, 809 F.2d 1526 (11th Cir. 1987)

In its opinion affirming Breier's conviction, the Court of Appeals held that the amendment made by the Firearms Owners' Protection Act (FOPA), Pub. L. 99-308, 100 Stat. 449 (1986), to 18 U.S.C. 921(a)—the addition of an express statutory definition of the term "engaged

in the business"—did not apply to Breier's case in light of the general federal saving clause, 1 U.S.C. 109, as the acts Breier committed which gave rise to the charges against him had been committed prior to the effective date of the FOPA. 813 F.2d at 215-6. In reaching this conclusion, the Court of Appeals placed itself in direct conflict with the Court of Appeals for the Eleventh Circuit in *United States v. Orellanes*, 809 F.2d 1526 (11th Cir. 1987), which determined that the amendments made by the FOPA applied to cases pending after the effective date of the FOPA.[1]

In *Orellanes*, the Eleventh Circuit was faced with the question of whether the amendment made by the FOPA to 18 U.S.C. 921(a)(20)—the definition of the term "crime punishable by imprisonment for a term exceeding one year" as used in 18 U.S.C. 922(h)(1)[2]—applied to Orellanes' case since the acts he committed which gave rise to the indictment—receipt of firearms and ammunition by a convicted felon—occurred prior to November 15, 1986, the effective date of the FOPA. After noting that § 101(5) of the FOPA—the amendment to 18 U.S.C. 921(a)(20)—expressly required that whether a previous state conviction constituted a "conviction" for purposes of § 922(h)(1) was a question of state—not federal—law, the Eleventh Circuit stated "[w]e now turn to Florida law, as P.L. 99-308, § 101(5) instructs, in our effort to determine whether Orellanes was properly characterized as a 'convicted felon.'" 809 F.2d at 1528. Thus, the Eleventh Circuit plainly recognized that the amend-

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[1] Orellanes was indicted on October 29, 1985, convicted on February 2, 1986, and sentenced on April 25, 1986. Oral argument in the Court of Appeals was held on November 18, 1986 and the decision of the Court of Appeals was filed on February 17, 1987.

[2] § 922(h)(1) as it existed when Orellanes was indicted, tried, convicted, and sentenced made it "unlawful for any person—(1) who . . . has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

ments made by the FOPA applied to cases pending after November 15, 1986 even if the acts giving rise to the case occurred prior to that date.[3]

It is important to note that the Eleventh Circuit in *Orellanes* was well aware of the general federal saving clause, 1 U.S.C. 109, when it held that the amendments made by the FOPA apply to cases pending after the effective date of the FOPA. The court's awareness is evident from the fact that, after holding that the FOPA-amended definition of § 921(a)(20) should apply, it rejected, on the basis of 1 U.S.C. 109, Orellanes' contention "that upon the effective date of section 101(5) of P.L. 99-308, his entire prosecution will abate. . . .", 809 F.2d at 1528. Thus, even in light of 1 U.S.C. 109, and in direct conflict with the Ninth Circuit in the instant case, the Eleventh Circuit has held that the amendments made by the FOPA apply to cases pending after the effective date of the FOPA.[4]

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[3] In holding as it did, the Eleventh Circuit agreed with the District Court for the Southern District of Texas in *United States v. Adair*, 649 F. Supp. 61 (S.D. Tex. 1986), which held that the amendments made by the FOPA applied to a case pending after the effective date of the FOPA where the acts giving rise to the case occurred prior to the effective date. In *Adair*, the Government conceded that, if the prosecution "had originally proceeded under the unamended [18 U.S.C.] § 922, then the redefinition of 'conviction' would have become available after November 15, 1986, to the Defendant as a defense at his trial." 649 F. Supp. at 62. As a result, the district court decided it could not "save [18 U.S.C. App.] § 1202(a) and not give recognition to the redefinition of 'conviction' " since to do so would "frustrate congressional intention . . . .", 649 F. Supp. at 62. Moreover, the District Court rejected the Government's argument that the prosecution was saved by the general federal saving clause since "1 U.S.C. § 109 was clearly not intended to result in a frustration of congressional intention . . . .", 649 F. Supp. at 62.

[4] Contrary to the assertion of the Ninth Circuit that the Second Circuit, in *United States v. Carter*, 801 F.2d 78 (2nd Cir. 1986), *cert. den.*, —— U.S. —— (1986), "was presented with the precise question at issue" (813 F.2d at 216) in *Breier*, *Carter* was *not*

To resolve this conflict, this Court should grant Breier a Writ of Certiorari to review the decision of the Court of Appeals.

II. THE ANALYTICAL PROCESS TO BE USED IN APPLYING THE GENERAL SAVING PROVISION, 1 U.S.C. 109, IS NOT SETTLED NOR HAS THIS COURT SETTLED THE QUESTION OF THE EFFECT OF THAT PROVISION ON AN ACT AMENDING A PENAL STATUTE, SUCH AS THE FIREARMS OWNERS' PROTECTION ACT, WHICH DOES NOT INCLUDE A SAVING CLAUSE BUT DOES INCLUDE CONGRESSIONAL FINDINGS EXPRESSING THE NEED FOR THE AMENDMENTS AS WELL AS AN EFFECTIVE DATE PROVISION RELATING TO CERTAIN TYPES OF PENDING CASES

Introduction

While this Court has spoken to the application of the general federal saving provision, 1 U.S.C. 109, on a handful of occasions since its original enactment in 1871, those decisions taken together do not establish a clear analytical process for the federal courts to follow in applying the general federal saving provision. Moreover, this Court has never dealt with the general saving provision in the context of a statutory scheme of the type in this case: where the amending act does not include a saving clause but does include congressional findings expressing the need for the amending act (see, § 1(b) of the FOPA) as well as a provision, in the effective date section of the amending act, applying certain amendments to cases pending on the date of enactment. See, § 110(b) of the FOPA. To settle this area of federal law, the Court should grant Breier's petition.

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pending after the effective date of the FOPA, November 15, 1986, as it was decided two months earlier, on September 11, 1986.

The Development of This Court's General Saving Provision Jurisprudence

A review of this Court's decisions concerning the general saving provision must begin with *United States v. Tynen*, 78 U.S. (11 Wall.) 88 (1871), where this Court held in substance

> that, under the general principles of the common law, the repeal of a penal statute operates as a remission of all penalties for violations of it committed before its repeal, and release from prosecution therefor after such repeal, unless there be either a clause in the repealing statute, or a provision of some other statue, expressly authorizing such prosecution. *United States v. Reisinger*, 128 U.S. 398, 401 (1888).

In response to *Tynen*,

> Congress enacted its first general saving provision, c. 71, 16 Stat. 432 (1871), to abolish the common-law presumption that the repeal of a criminal statute resulted in the abatement of "all prosecutions which had not reached final disposition in the highest court authorized to review them." *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 660 (1974), *reh'g den.*, 419 U.S. 1014 (1974).

Following the enactment of the general saving provision, this Court's first consideration of it arose in *Reisinger*, where it was decided only that "the saving clause's use of the words 'penalty,' 'liability,' and 'forfeiture' required the conclusion that the clause covered criminal statutes." *Marrero*, 417 U.S. at 661.

In *Reisinger*, this Court had before it a case arising from acts committed in 1883 which violated a federal statute enacted in 1878 but which had been "expressly repealed by the act of July 4th, 1884. . . ." 128 U.S. at 400. As the defendant was not indicted until April, 1885, almost a year after the statute pursuant to which he was charged was repealed, he contended that the repeal of the statute "operate[d] as a remission of all

penalties. . . " 128 U.S. at 401. The repealing act of 1884 having not included "any saving clause or reservation of the right to prosecute or punish for offenses in violation of" the repealed statute or any other expression on congressional intent, the general saving provision was applied. 128 U.S. at 400-1. To apply the general saving provision properly, this Court held that it was necessary "to read the act of 1884 in connection with [the general saving clause] as one act." 128 U.S. at 401. From such an application of the general saving provision, it was readily apparent that Reisinger's prosecution did not abate.

Twenty years after *Reisinger*, this Court again dealt with the general saving provision. Unlike in *Reisinger*, however, the repealing act in *Great Northern Railway Company v. United States*, 208 U.S. 452 (1908) included a limited saving clause "solely addressed to the remedies to be applied in the future carrying on of [pending] cases." 208 U.S. at 467-8. Faced with the defendants' contention that such a saving clause "manifest[ed] the intention of Congress that no offenses theretofore committed against the [repealed] act should be prosecuted, unless a prosecution was then pending," 208 U.S. at 464, this Court expanded upon the analytical process to be applied in cases involving the general saving provision that it had only briefly addressed in *Reisinger*. This Court thus stated that, as the general saving provision

> has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment. But while this is true the provisions of [the general saving clause] are to be treated as if incorporated in and as a part of subsequent enactments, and therefore under the general principles of construction requiring, if possible, that effect be given to all the parts of a law the section must be enforced unless either by express declaration or necessary implication, arising from the terms of

> the law, as a whole, it results that the legislative mind will be set at naught by giving effect to the provision of [the general saving clause]. 208 U.S. at 465.

Applying that analytical process to the case before it, this Court reviewed the only indication of congressional intent available, the precise language of the repealing act's saving clause,[5] finding that it did not "expressly or by fair implication, conflict with the general rule established by [the general saving provision]," 208 U.S. at 466, and that it "serves to make clear the fact that the legislative mind was concerned with the confusion and uncertainty which might be begotten from applying the new remedies to causes then pending in the courts. . . ." 208 U.S. at 467. It was, therefore, "the purpose of Congress to leave cases pending in the courts to be prosecuted under the prior remedies, thus causing the new remedies created to be applicable to all controversies not at the time of the passage of the act pending in the courts." 208 U.S. at 467. As a result of its understanding of Congress' intent, as expressed in the language of the repealing statute's saving clause, this Court concluded that it was not "the intention of Congress to depart from the general principle expressed in" the general saving provision and held that prosecutions for acts committed prior to the effective date of the repealing act were not abated. 208 U.S. at 469.

Hertz v. Woodman, 218 U.S. 205 (1910), followed on the heels of *Great Northern Railway Company*. Like *Great Northern Railway Company*, *Hertz* involved a repealing act which included a saving clause. And, as in *Reisinger* and *Great Northern Railway Company*, *Hertz*

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[5] "That all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in the courts of the United States, but such causes shall be prosecuted to a conclusion *in the manner* heretofore provided by law." (emphasis added). 208 U.S. at 466.

held that the general saving provision was "a rule of construction . . . to be read and construed as a part of all subsequent repealing statutes, in order to give effect to the will and intent of Congress." 218 U.S. at 217. Because the general saving provision was nothing more than "a rule of construction," it was observed that, if the repealing act's saving clause "necessarily, or by clear implication, conflicts with the general rule declared in [the general saving provision], the latest expression of legislative will must prevail." 218 U.S. at 218. Apparently finding that the repealing act's saving clause did not conflict with the general saving provision nor "by plain implication" did the repealing act's saving clause "cut[] down the scope and operation of the general rule in [the general saving provision]," 218 U.S. at 218, *Hertz* concluded only that the tax liability sought to be avoided "was saved by the saving clause of the repealing act." 218 U.S. at 224. Thus, other than reiterating the analytical process set forth in *Great Northern Railway Company*, *Hertz* added nothing to the jurisprudence of the general saving provision.

More than fifty years after *Hertz*, in *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964), this Court was faced with determining whether the federal Civil Rights Act, which generally preempted and nullified certain state penal statutes—such as the one under which Hamm had been prosecuted and convicted—abated pending state prosecutions.

Considering "first the effect the Civil Rights Act would have on petitioners' convictions if they had been federal convictions," 379 U.S. at 312, *Hamm* observed preliminarily that the common law rule regarding repeal of a penal statute exemplified by *Tynen*, *supra*, and set forth in *Reisinger*, *supra* "does not depend on the imputation of a specific intention to Congress in any particular statute," but rather "takes the more general form of imputing to Congress an intention to avoid inflicting punish-

ment at a time when it can no longer further any legislative purpose, and would be unnecessarily vindictive." 379 U.S. at 313. In so many words, *Hamm* thus reiterated that there is a presumption that repeal of a penal statute abates prosecutions. As a result, *Hamm* held that the absence in the Civil Rights Act of a provision expressly abating prosecutions was "irrelevant" in determining whether the Civil Rights Act abated prosecutions.

This Court then turned to the federal saving provision —then, as now, codified in 1 U.S.C. 109—to determine if it "would nullify abatement of a federal conviction." 379 U.S. at 314. By-passing the analytical process mostly recently set forth in *Hertz*, *Hamm* concluded that the general federal saving provision would not "nullify abatement of a federal conviction" since the purpose of the federal saving provision was "to obviate mere technical abatement. . . ." 397 U.S. at 314.[6]

In by-passing the use of the analytical process set forth most recently in *Hertz*, this Court apparently adopted a new analytical process wherein the question for resolution in applying the general saving provision was not to determine "the will and intent of Congress," *Hertz*, 218 U.S. at 217, but rather to determine whether a repealing act "technically abated" prosecutions. In establishing this analytical process, this Court disturbed what, until *Hamm*, was settled law, particularly as the *Hamm* analytical process is dependent upon the meaning of the phrase "mere technical abatement."

While *Hamm* did not explain what the phrase "mere technical abatement" meant, in view of the citation of

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[6] Having concluded that the general saving provision would not "nullify abatement of a federal conviction," *Hamm* held that it would also not nullify abatement of a state conviction as the distinction between federal and state convictions was "a distinction without a difference." 379 U.S. at 314.

Tynen, it appears to contemplate that the general saving provision is limited solely to nullifying abatement where there was an amendment to a penal statute effectively increasing penalties. Conversely, it appears that this Court in *Hamm* contemplated that amendments to penal statutes which made lawful conduct which was previously unlawful would not be affected by the general saving provision and thus such amendments *were* to abate prosecutions in the absence of express congressional direction, since "the principle of abatement is so firmly imbedded in our jurisprudence as to be a necessary and proper part of every statute working a repealer of criminal legislation." 379 U.S. at 316. Such an understanding of the general saving provision leaves open a very wide area of uncertainty as to its effect and casts into doubt the continued vitality of the analytical process of *Hertz* and its predecessors.[7] Indeed, as Justice Black noted in dissent,

> the Court has now put back on Congress the burden of spelling out expressly, statute by statute, in laws passed hereafter that it does not want to upset convictions for past crimes, a burden which Congress renounced nearly 100 years ago and which it did not know it had when it passed the 1964 Act. 379 U.S. at 320 (Black, J., dissenting).[8]

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[7] *Hamm's* reference to the fact that "Congress . . . clearly intended to eradicate an unhapply chapter in our history," 379 U.S. at 315, is not sufficient to suggest that, after *Hamm*, the *Hertz* analytical process had continuing vitality since this statement reflects only this Court's understanding of congressional intention regarding the overall purpose of the Civil Rights Act, not regarding a more specific intention as to pending cases. This is particularly true in view of the fact that *Hamm* nowhere mentions *Hertz* or *Great Northern Railway Company*.

[8] A relatively recent district court opinion, in reviewing the current jurisprudence of the general saving provision, cogently observed that *Hamm* "virtually st[oo]d the language of § 109 on its head . . . ." *United States v. Jimicum*, 608 F. Supp. 1530, 1538 (E.D. Was. 1985), *rev'd sub. nom. United States v. Edmonson*, 792 F.2d 1492 (9th Cir. 1986), *cert. den.*, —— U.S. —— (1987).

Distinguishing *Hamm, Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1972), held that the general saving provision nullified abatement of the prosecution of a union and three of its officers for conspiring to make unlawful political contributions where the prosecution was brought pursuant to a statute which had been amended while the case was pending before this Court. Like in *Reisinger* and *Hamm*, but in contrast to *Great Northern Railway Company* and *Hertz*, the amending act in *Pipefitters* did not include a saving clause. Thus, this Court first turned to the legislative history of the amending act to determine if there was any congressional intent to "overcome" the common law presumption continuously recognized from *Tynen* to *Hamm*. 407 U.S. at 432. That effort led to the conclusion that Congress did not intend in enacting the amending act to nullify the presumption that prosecution would abate.

This Court next turned to the general saving provision, holding that it "operates to nullify any abatement of the prosecution." 407 U.S. at 433. In utilizing such an analytical process, *Pipefitters* appears to have revived, at least to a degree, the analytical process set forth in *Great Northern Railway Company* and *Hertz*. Yet, in distinguishing, not overruling *Hamm*, it also appears that the *Hamm* analytical process retains at least some vitality and that, in some cases involving a non-technical amendment—i.e., an amendment that redefines what conduct is unlawful—the general saving provision would not apply. Indeed, in noting that the general saving provision nullified abatement of the prosecution because the amending act "retains the *basic offense*" (emphasis added), 407 U.S. at 435, this Court not only appears to have approved *Hamm* but possibly to have created a third analytical process to be utilized in determining the effect of the general saving provision.

The most recent case from this Court dealing with the general saving provision is *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653 (1974), *reh'g den.* 419

U.S. 1014 (1974). Like *Great Northern Railway Company* and *Hertz*, the repealing act in *Marrero* included a saving clause. After holding that the saving clause of the repealing act preserved the penalty structure—non-eligibility for parole—which Marrero argued did not apply after the effective date of the repealing act, this Court turned to the question of the effect on Marrero's sentence of the general saving provision.

Apparently believing that application of the general saving provision was not precluded because of contrary congressional intent, there being "no conflict," 417 U.S. at 659, n.10, between the repealing act's saving clause and the general saving provision and no other expression of congressional intent on the issue, this Court proceeded directly, without mentioning the analytical process to be applied, to the issue before it: the narrow question of whether "the prohibition of 26 U.S.C. § 7237(d) against the offender's eligibility for parole under 18 U.S.C. § 4204 is a 'penalty, forfeiture, or liability' saved from release or extinguishment by 1 U.S.C. § 109." 417 U.S. at 660. Recognizing that the general saving provision "does not ordinarily preserve discarded remedies or procedures," 417 U.S. at 441, *Marrero* held that "the legislative history of § 7237(d) reveals that Congress meant ineligibility for parole to be treated as part of the 'punishment' for the narcctics offenses for which respondent was convicted." 417 U.S. at 661-2. Thus, this Court found that the parole ineligibility provision was an element of punishment, resulting in the conclusion that it was "saved from release or extinguishment" by the general saving provision. 417 U.S. at 661.

In sum, therefore, *Marrero* sheds no light on the current state of the analytical process to be utilized in determining the effect of the general saving clause.[9] It

[9] After reviewing "those post-*Marrero* decisions which have been published," the district court in *Jimicum*, 608 F. Supp. at 1539, observed that those decisions "may be broken down into three broad categories: (1) those which have embraced a strict, technical, and

is thus plain that *Pipefitters* was the last case in which this Court expressed any view of the analytical process to be used in determining the effect of the general saving provision.

CONCLUSION

From the above discussion, it is clear that federal law regarding the analytical process to be used in applying the general saving provision is not settled. Moreover, how this Court would address a statutory scheme such as the one presented by this case—where there are congressional findings in the amending act expressing the need for the act (See, § 1(b) of the FOPA) as well as language in the effective date provision of the amending act applying certain amendments to cases pending on the date of enactment (See, § 110(b) of the FOPA)—is uncertain, since this Court has never before dealt with a statutory scheme similar to the one in the instant case. To settle these issues, it is appropriate for this Court to grant a writ of certiorari in this case.

Respectfully submitted,

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December, 1987

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literal approach in applying § 109 with undeviating harshness; (footnote omitted) (2) those which have adopted a considerably more flexible approach based on the totality of the circumstances surrounding a given piece of legislation (footnote omitted); and (3) those which have not really taken a stance on the role of § 109 in modern-day statutory construction, but which at the same time, have exhibited remarkable creativity in avoiding that precise question (footnote omitted)." 608 F. Supp. at 1539. The cases from which these categories were derived are found in footnotes 10, 11, and 12 of the district court's opinion.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5140

D.C. No. CR-86-0094-AHS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DONALD DOUGLAS BREIER,
Defendant-Appellant.

ORDER AND DISSENT

Filed September 16, 1987

Before: Joseph T. Sneed, Jerome Farris and John T. Noonan, Jr., Circuit Judges.

Dissent by Judge Noonan

COUNSEL

Charles C. Lee, Los Angeles, California, for the plaintiff-appellee.

Theodora Poloynis-Engen, Alexander W. Kirkpatrick, Pasadena, California, for the defendant-appellant.

ORDER

Appellant's petition for rehearing is denied. Judge Noonan's dissent from the denial of the petition for rehearing is attached.

DISSENT

NOONAN, Circuit Judge, dissenting from denial of rehearing:

Donald Douglas Breier is a hobbyist who has been turned into a criminal by the too vivid zeal of government agents and prosecutors. Like many others hobbyists—stamp collectors for example—he swapped parts of his collection and sold and bought other parts. Admittedly guns are more dangerous than stamps, and Congress has seen fit to regulate gun dealers. But unlike stamps, guns are the subject of constitutional protection: "the right of the people to keep and bear arms shall not be infringed." United States Constitution, Amendment II. Congress has regulated guns, sensitive to the Second Amendment and to the difference between hobbyists and those making a living out of the gun business.

The Committee on the Judiciary took formal note of the complaint that "enforcement of the Gun Control Act had been overzealous." H.R. Rep. No. 99-495 (1986), 99th Cong., 2nd Sess. *reprinted, U.S. Code Cong. & Ad. News*, 1327, 1329. In the light of such complaint and other testimony, the Judiciary Commission reported, and Congresss enacted, legislation pointedly entitled "Firearms Owners' Protection Act", 100 Stat. 449 (1986). The Act begins with two congressional findings. First, Congress finds that Second Amendment and other constitutional rights of citizens "require additional legislation to correct existing firearms statutes *and enforcement policies* (emphasis supplied). Second, Congress finds that:

> . . . additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the

> purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." 100 Stat. 449 (1986).

After making these findings Congress went on to amend 18 U.S.C. § 921 by *inter alia* defining the term "engaged in business." The definition sets out that to be a dealer one must have "the principal objective of livelihood and profit" from the trade.

Called upon to construe 18 U.S.C. § 921 in the light of the Firearms Owners' Protection Act, a court should not hesitate to respond to the congressional concern of correcting existing enforcement policy, and a court should not fail to acknowledge the explicit declaration that Congress in this legislature is reaffirming the intent of the Gun Control Act of 1968. The 1986 amendment makes crystal-clear how the old statute should be read: the law was not meant to reach the hobbyist who is not making his living out of trading in guns.

The opinion of the court relies on 1 U.S.C. § 109. *United States v. Breier*, 813 F.2d 212, 214 (9th Cir. 1987). The statute is addressed to "the repeal of any statute." It is not obvious that the Firearms Owners' Protection Act is, in general or in the particular section on dealers, a repealing statute; certainly the terms "repeal" is not employed and the text of the Act did not alert Congress to the possibility that its legislative clarification of particular subsections of earlier law would be read in conjunction with the statute on the repeal of a statute.

The repeals statute is in any case applicable only to "penalties, forfeitures or liabilities." A change in the

definition of the terms of a statute is not a change in a "penalty, forfeiture or liability." Those terms are "synonymous with the word punishment in connection with crimes of the highest grade." *United States v. Reisinger*, 128 U.S. 398 (1888). Neither the Supreme Court nor this Circuit is to the contrary. Rather, the federal savings clause has been carefully applied where a real penalty has been changed and the old penalty must be preserved. *Warden v. Marrero*, 417 U.S. 653, 660 (1974); *White v. Warden*, 566 F.2d 57, 59 (9th Cir. 1977). There is no basis in controlling authority for the court's expansive reading that treats a definitional adjustment as the extinguishment of a penalty.

Nor is there any social justification for the court's gloss on the statute. When it is clear, by congressional amendment, that a statute was never meant to punish certain conduct and never will again punish that conduct in the future, what is the point of punishing someone for its violation? Deterrence is not served since the crime can never be committed again. Restraint is unnecessary for the conduct is now legal. Retribution cannot be served because any predisposition to repeat the act will be to repeat an act no longer criminal. Deterrence is not achieved because there is no need to dissuade others from committing what is no longer a crime. *Comment, Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. Pa. L. Rev. 120, 149 (1972).

The court falls back on a second level of analysis, contending that retroactivity would be "plainly contrary to Congress's intent" because Congress explicitly provided that the amendments did not become effective until November 15, 1986. *Breier*, *supra* at 216, invoking *United States v. Carter*, 801 F.2d 78 (2nd Cir.), *cert. denied*, 107 S.Ct. 657 (1986). Reliance on an inference made from the statute's effective date is misplaced. The intention of Congress does not need to be inferred. Congres-

sional intention is explicitly stated in the findings that introduce the statute.

In light of that strong and clear expression, it is incumbent on us to interpret the new law as a clarification of the old, not as a repeal. To say that retroactivity is plainly contrary to Congress' intent is to put implication and inference above explicitness and specificity; to honor the congressional will in word and ignore it in deed; to disappoint the hopes and thwart the purpose of the sponsors of the legislation which the court purports to interpret.

My reading of the statute leads me to address the government's fall-back position that even in terms of the 1986 amendments Breier is guilty. The court notes that Breier owns a design telecommunications system, and it does not dispute Breier's claim that he realized a net loss on his firearm dealings. The evidence did not show him to be one who devoted "time, attention and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit." Even if it were granted that he might have sought profit, he did not seek his livelihood in this way. Breier was not a dealer.

To recapitulate: the court inexplicably prefers to divine congressional intent by inference from a general statute not in terms applicable; it ignores the clear expression of congressional intent in a recent relevant statute clarifying the earlier law; and it achieves the socially regressive objective of punishing a person for conduct that is now not criminal.

I repent my earlier concurrence and would reverse Breier's conviction.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 86-5140

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DONALD DOUGLAS BREIER,
Defendant-Appellant.

Argued and Submitted Feb. 2, 1987

Decided March 16, 1987

Concurrence Filed March 23, 1987

Appeal from the United States District Court
for the Central District of California

Charles C. Lee, Los Angeles, Cal., for plaintiff-appellee.

Theodora Poloynis-Engen, Alexander W. Kirkpatrick, Pasadena, Cal., for defendant-appellant.

Before SNEED, FARRIS and NOONAN, Circuit Judges.

SNEED, Circuit Judge:

Donald Breier appeals from his conviction of five violations of 18 U.S.C. § 922(a)(1), unlicensed dealing in

firearms. Breier argues that the recently-enacted Firearms Owners' Protection Act should apply retroactively to his case, thereby warranting a new trial. Because we find that the federal savings clause, 1 U.S.C. § 109, mandates non-retroactivity, we affirm the judgment of conviction.

I.

FACTS AND PROCEEDINGS BELOW

Donald Breier owns a design telecommunications system company, and has a keen interest in firearms. Beginning sometime in the summer of 1984, Breier began renting tables at gun shows, where he engaged in the trading, selling and purchasing of firearms. In April, 1985, agent Dan Smith of the Bureau of Alcohol, Tobacco and Firearms (ATF) began investigating the defendant after receiving information that Breier was trading in firearms on a regular basis. Smith spoke with Breier over the telephone on April 19, and warned him he was required to obtain a federal firearms license if he was buying or selling firearms on any sort of regular basis. Breier assured Smith that he was a collector only, and was not regularly trading in firearms.

The ATF investigation into Breier's activities continued. Over the next year and a half, Agent Smith and other ATF agents attended gun shows in an undercover capacity and purchased firearms from Breier. Breier realized a gross profit on these transactions, but claims he suffered a net loss after the cost of renting the tables is subtracted.

In February, 1986, Breier was indicted by a grand jury on five counts of violating 18 U.S.C. § 922(a)(1), unlicensed dealing in firearms. A jury trial commenced on April 1, 1986, and Breier was convicted by the jury on all five counts. On May 11, Breier was sentenced to a term of forty-five days in the custody of the Attorney

General, five years probation, and a $5000.00 fine. Only a few days later, May 19, 1986, the President signed the Firearms Owners' Protection Act, Pub.L. No. 99-308, 100 Stat. 449 (1986). The 1986 Act became effective 180 days after enactment, *i.e.*, November 15, 1986. *See* Pub. L. No. 99-308, § 110(a), 100 Stat. at 460. As will be seen, the 1986 Act was considered by Breier to be more favorable to his position than was the law under which he was tried and convicted. On May 20, Breier timely filed a notice of appeal.

II.

DISCUSSION

Section 922(a)(1) of 18 U.S.C. provides, in pertinent part, that it is unlawful "for any person, except a . . . licensed dealer, to engage in the business of . . . dealing in firearms." 18 U.S.C. § 921(a)(11) provides, in relevant part, that a "dealer" is "any person engaged in the business of selling firearms . . . at wholesale or retail." The law at the time the defendant was convicted did not further define the term "dealer" by setting forth a definition of the term "engaged in the business." Courts have fashioned their own definitions of the term. For example, we have previously stated "that where transactions of sale, purchase or exchange of firearms are regularly entered into in expectation of profit, the conduct amounts to engaging in business." *United States v. Van Buren*, 593 F.2d 125, 126 (9th Cir.1979) (per curiam). In *United States v. Wilmoth*, 636 F.2d 123 (5th Cir. Unit A 1981), the Fifth Circuit stated that to prove the status of the accused as one engaged in the business of dealing in firearms, "the Government must show a greater degree of activity than the occasional sale of a hobbyist." *Id.* at 125. "It is enough to prove that the accused has guns on hand or is ready and able to procure them for the purpose of selling them from time to time to such persons as might be accepted as customers."

Id.; *accord United States v. Carter*, 801 F.2d 78, 82 (2d Cir.), *cert. denied*, —— U.S. ——, 107 S.Ct. 657, 93 L.Ed.2d 712 (1986); *United States v. Burgos*, 720 F.2d 1520, 1527 n. 8 (11th Cir.1983). Both parties agree that the jury instruction in this case was in accordance with interpretations of § 922(a)(1) given by this and other circuits.[1]

Under the revised law that went into effect on November 15, 1986, the definition of the offense, 18 U.S.C. § 922(a)(1), and the definition of a firearms "dealer," 18 U.S.C. § 921(a)(11)(A), remain the same. However, section 101 of the 1986 Act provides further definition

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[1] The court instructed the jury as follows:

> The term "dealer", for purposes of this case, is defined as "any person engaged in the business of selling firearms or ammunition at wholesale or retail . . ."
>
> A business is an activity which occupies a person's time, attention and labor, with some regularity or continuity, for the purpose of livelihood or profit. One may be engaged in a business even though the business does not require all, or even a substantial portion, of his working time. Nor is it necessary to show that a profit was actually made.
>
> A person engages in the business of dealing in firearms if he has guns on hand or is ready and able to procure them, in either case for the purpose of selling some or all of them to such persons as he might from time to time accept as customers. Such business need not be the defendant's primary business, nor must he make a certain amount of profit from the business. The statute is aimed at those who hold themselves out as a source of firearms, or those who engage in regular and repeated buyings and/or sellings of firearms, as opposed to an isolated or occasional transaction.
>
> The distinction between collecting as a hobby and dealing as a business is ont unknown to the law and where transactions of sale, purchase or exchange of firearms are regularly entered into in expectation of profit, the conduct amounts to engaging in business.

Reporter's Transcript at 3-92 to 3-93.

with respect to the term "engaged in the business" as follows:

> (21) The term 'engaged in the business' means—
>
> . . .
>
> (C) As applied to a dealer in firearms, as defined in section 921(a)(11)(A), a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms;
>
> (22) The term 'with the principal objective of livelihood and profit' means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection.

Pub.L. No. 99-308, § 101, 100 Stat. at 450.

Although subsections 921(a)(21) and 921(a)(22) are not included among the list of retroactive sections found in section 110(b) of the 1986 Act, Breier argues that we should apply these sections retroactively and remand for a new trial. To prevail Breier also faces the formidable obstacle of the federal savings clause, 1 U.S.C. § 109, which reads as follows:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

Congress enacted the forerunner of § 109 "to abolish the common-law presumption that the repeal of a criminal statute resulted in the abatement of 'all prosecutions which had not reached final disposition in the highest court authorized to review them.'" *Warden v. Marrero*, 417 U.S. 653, 660, 94 S.Ct. 2532, 2536, 41 L.Ed.2d 383 (1974) (quoting *Bradley v. United States*, 410 U.S. 605, 607, 93 S.Ct. 1151, 1153, 35 L.Ed.2d 528 (1973)); *see Hamm v. City of Rock Hill*, 379 U.S. 306, 314, 85 S.Ct. 384, 390, 13 L.Ed.2d 300 (1964).[2]

Although the savings clause on its face applies to the "repeal of any statute," it has been held to apply to statutory amendments as well. *E.g., United States v. Mechem*, 509 F.2d 1193, 1194 n. 3 (10th Cir. 1975) (per curiam); *see White v. Warden*, 566 F.2d 57, 59 (9th Cir. 1977). In *Marrero*, the Court held that the prohibition

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[2] Anomalous results developed at common law when a criminal statute was repealed and reenacted with different penalties. A criminal defendant who was fortunate enough to have his offense made the subject of stiffer penalties was able to skate completely free. At common law the repealed statute could not be charged, nor could the replacement statute in view of *ex post facto* prohibitions. *See United States v. Tynen*, 78 U.S. (11 Wall.) 88, 20 L.Ed. 153 (1871). The defendant's prosecution was said to "technically" abate. In *Hamm*, 379 U.S. at 314, 85 S.Ct. at 390, the Supreme Court concluded that Congress adopted the original federal saving statute in 1871 "to obviate mere technical abatement such as that illustrated by the application of the rule in *Tynen*." A nontechnical abatement of prosecution occurred at common law when a statute was changed so that the conduct in question was no longer a crime. The Supreme Court has applied § 109 to avoid nontechnical as well as technical abatements. *See, e.g., Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535, 553-55, 74 S.Ct. 745, 755-56, 98 L.Ed. 933 (1954); *Hertz v. Woodman*, 218 U.S. 205, 214-18, 30 S.Ct. 621, 623-24, 54 L.Ed. 1001 (1910); *United States v. Reisinger*, 128 U.S. 398, 401-02, 9 S.Ct. 99, 101-02, 32 L.Ed. 480 (1888). The Court has more recently indicated that focus on whether a prosecution would "technically abate" under the common law rule is not the proper analysis. *Marrero*, 417 U.S. at 660 n.11, 94 S.Ct. at 2537 n.11.

on parole eligibility under 26 U.S.C. § 7237(d), which was repealed while the defendant was serving his sentence, was preserved by the federal savings clause. 417 U.S. at 659-64, 94 S.Ct. at 2536-39. The Court stated that the determinative question is whether the repealed prohibition is a "penalty, forfeiture, or liability" saved from extinguishment by 1 U.S.C. § 109. *Id.* at 660, 94 S.Ct. at 2536. *Marrero* was the last opportunity for the Court to consider § 109.

Lower courts have not adopted a uniform approach to § 109.[3] There have been only five post-*Marrero* cases from this circuit discussing § 109, and none provides much assistance to deciding this case. *See United States v. Edmonson*, 792 F.2d 1492, 1498 n. 5 (9th Cir. 1986) (finding it unnecessary to reach the § 109 issue), *cert. denied*, —— U.S. ——, 107 S.Ct. 892, 93 L.Ed.2d 844 (1987); *Mendoza v. Wight Vineyard Management*, 783 F.2d 941, 945 (9th Cir.1986) (per curiam) (finding a waiver of the § 109 argument); *Friel v. Cessna Aircraft Co.*, 751 F.2d 1037, 1039 (9th Cir.1985) (per curiam) (declining to apply § 109 to a statute of limitations in a civil context); *United States v. Spawr Optical Research, Inc.*, 685 F.2d 1076, 1078 n. 2 (9th Cir.1982) (applying

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[3] A recent district court opinion examined the various judicial approaches in recent years to § 109, and broke them down into three categories:

> "(1) those which have embraced a strict, technical, and literal approach in applying § 109 with undeviating harshness; (2) those which have adopted a considerably more flexible approach based on the totality of the circumstances surrounding a given piece of legislation; and (3) those which have not really taken a stance on the role of § 109 in modern-day statutory construction, but which at the same time, have exhibited remarkable creativity in avoiding that precise question."

United States v. Jimicum, 608 F.Supp. 1530, 1539 (E.D.Wash. 1985) (footnotes omitted), *rev'd sub. nom. United States v. Edmonson*, 792 F.2d 1492 (9th Cir. 1986), *cert. denied*, —— U.S. ——, 107 S.Ct. 892, 93 L.Ed.2d 844 (1987).

§ 109 to find no abatement), *cert. denied*, 461 U.S. 905, 103 S.Ct. 1875, 76 L.Ed.2d 807 (1983), *White*, 566 F.2d at 61-62 (applying § 109 in conjunction with four other factors to find nonretroactivity).

Guided by the analysis used by the Supreme Court in *Marrero*, we find that 1 U.S.C. § 109 bars retroactive application of the pertinent portion of section 101 of the 1986 Act. That portion of section 101 repealed a "liability" to which Breier previously was subject. Congress, as already pointed out, included a provision in the 1986 Act specifying which sections were to have retroactive effect and the sections in question here were not included in that list. This precludes the finding of an implied congressional intent of retroactivity, as the court found in *Mechem*, 509 F.2d at 1195-96. This returns us to § 109, which directs that the guilt of Breier be measured by 18 U.S.C. § 922(a)(1), with its accompanying judicial construction, as it stood prior to the effective date of the 1986 Act.

The legislative history of the 1986 Act shows that Congress was well aware of the judicial interpretations of the term "engaged in the business."[4] It enacted new subsections 921(a)(21) and 921(a)(22) in order to limit the conduct deemed to be criminal. This, to repeat, repealed a "liability." We must presume that Congress was familiar with the federal savings clause, and had it intended to alter the effect given to conduct before the amendment it would have so indicated.

Breier erroneously relies on *United States v. Blue Sea Line*, 553 F.2d 445 (5th Cir.1977). In *Blue Sea Line*, the Fifth Circuit found that the repeal of a criminal statute and replacement of it with penal civil sanctions was "procedural" in nature and thus not affected by § 109. *Id.* at 448-50. The court found that in enacting

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[4] *See* 131 Cong.Rec. S9127 (daily ed. July 9, 1985); 131 Cong.Rec. S8689 (daily ed. June 24, 1985) (statement of Sen. Hatch).

the amendments in question, "Congress was clearly not engaged in ameliorating criminal punishment. . . . On the contrary, its concern was to tighten enforcement of the existing monetary sanctions." *Id.* at 450. Not so in this case. Ameliorating substantive criminal liability is exactly what Congress intended by enacting the portion of the 1986 Act with which we are concerned. Thus, *Blue Sea Line* and other cases making the procedure/penalty distinction are inapposite.

We take comfort in the recent Second Circuit opinion in *United States v. Carter*, 801 F.2d 78 (2d Cir.), *cert. denied*, —— U.S. ——, 107 S.Ct. 657, 93 L.Ed.2d 712 (1986). There the court was presented with the precise question at issue here, whether new subsections 921(a)(21) and 921(a)(22) should be applied retrospectively. The court concluded they should not be:

> [E]ven if we believed these amendments to § 921 so narrowed the scope of the activities covered by § 922(a)(1) that defendants' conduct would be excluded, we would not apply them retroactively, since such retrospectivity is plainly contrary to Congress's intent. The [1986] Act provides that the amendments to § 921 do not become effective until 180 days after enactment, *i.e.*, November 15, 1986.

Id. at 83.

The judgment of conviction is affirmed.[5]

AFFIRMED.

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[5] *United States v. Adair*, 649 F.Supp. 61 (S.D. Tex. 1986), is not inconsistent with our opinion. The *Adair* court found that the savings clause did not preserve former 18 U.S.C.App. § 1202(a), repealed by the 1986 Act, which along with 18 U.S.C. § 922 prohibited the possession of a fireman by a convicted felon. *Id.* at 62. That offense is now proscribed solely by § 922, which under the 1986 Act contains a different definition of "conviction" than did § 1202(a). The court held that the prosecution could not proceed under the former statute because such a proceeding would frustrate con-

NOONAN, Circuit Judge, concurring:

I concur because of the express intent of Congress to make the amendments to the Firearms Owners' Protection Act effective only 180 days after the enactment of the law. 100 Stat. 461 (1986). I do not believe that the definition is "a liability" in the sense of the Federal Savings Clause, 1 U.S.C. § 109. As the Supreme Court has said, the words "penalty" "forfeiture" and "liability" are "synonymous with the word 'punishment' in connection with crimes of the highest grade." *U.S. Reisinger*, 128 U.S. 398, 9 S.Ct. 99, 32 L.Ed.2d 480 (1888), quoted *Warden v. Marrero*, 417 U.S. 653, 661, 94 S.Ct. 2532, 2537, 41 L.Ed.2d 383 (1974). It is a violent stretch of language to treat a definition as a punishment.

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gressional intent. Although not directly faced with the question, the *Adair* court assumed, and apparently the government conceded, that the redefinition of "conviction" would apply in prosecutions under § 922 for offenses committed before passage of the 1986 Act. *Id. Adair* is distinguishable because the redefinition of "conviction" does not alter the effect given to conduct before the amendment, but rather merely alters the class of persons for whom the proscribed conduct is prohibited.